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STATE OF CONNECTICUT  
APPELLATE COURT

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A.C. 42469  
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JUDITH KISSEL

vs.

CENTER FOR WOMEN'S HEALTH, P.C., ET AL.

—  
REPLY BRIEF OF DEFENDANT-APPELLANT REED WANG  
WITH ATTACHED APPENDIX  
—

To BE ARGUED BY:

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## REPLY ARGUMENT

### I. THE COURT SHOULD HAVE DISMISSED THE ACTION.

The Defendants filed a timely motion to dismiss for lack of personal jurisdiction, which preserved the claim, but the Plaintiff insists the Defendants had to raise the issue again prior to trial when this Court released decisions in cases the Plaintiff claims a few pages later do not control. A party who has properly preserved a jurisdictional issue on a motion to dismiss concerning the application of a statute is not required to raise the claim again where an appellate tribunal has issued a favorable decision after the ruling on the motion to dismiss. Such a rule would not make sense, as judicial decisions merely state what the statute has always meant. In this case, that means Judge Karazin should have granted the Defendants' motions to dismiss and denied the Plaintiff's motion to amend her complaint in 2012 even without the explicit appellate authority released in 2018 after the trial.

Further, ignoring well established law that judgments entered without personal jurisdiction are nullities, the Plaintiff asserts that enforcing the statute and conforming to this long-established rule of statutory interpretation elevate form over substance. She offers no pertinent authority for this remarkable proposition. Finally, the Plaintiff asserts that a three-year statute of limitations applies because the date she discovered that she was injured by the lamp was not established and invents a requirement that the Defendants should have anticipated this outlandish argument by pleading a statute of limitations defense. Neither the plain language of General Statutes § 52-190a nor the record support this claim.

#### A. **There Was No Finding of Waiver and No Waiver.**

In claiming that the trial court found that the Defendants waived their claim as to personal jurisdiction (Pl.'s Br. at 12), the Plaintiff misreads the court's decision on the postverdict motions. Judge Povodator made no finding of waiver.<sup>1</sup> Rather, he concluded that "[i]t would be inequitable and highly wasteful to reverse the earlier decisions in such a belated fashion."

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<sup>1</sup> Consequently, the Plaintiff's criticism that Dr. Wang failed to attack a non-existent finding (see Pl.'s Br. at 14) is without merit.

(MOD, 1/3/19, at 19; App. at A163.) The only mention of waiver is his justification of resorting to equity when he noted that “other [non-subject matter] jurisdictional issues are subject to waiver – and inferentially subject to other equitable considerations.” (*Id.* at 20; App. at A164.) But the very next sentence shows the context to be “with respect to entertaining reargument and reconsidering the earlier decision,” and concludes that “the equities overwhelmingly dictate against affording any relief.” (*Id.*) In short, the reference to waiver has nothing to do with whether the Defendants possibly waived the issue of personal jurisdiction but rather concerned whether they possibly waived the right to have the trial court reconsider the earlier decision. It leaves intact the Defendants’ 2012 attack on personal jurisdiction.

Waiver normally is a question of fact, *RBC Nice Bearings, Inc. v. SKF USA, Inc.*, 318 Conn. 737, 747 (2015), and this Court does not find facts in the first instance.<sup>2</sup> *Welsh v. Martinez*, 191 Conn. App. 862, 884 (2019). While appellate courts may impute a factual finding supported by the record where the decision is silent, courts do not do so where the trial court has stated the basis for its decision. See *Brooks v. Brooks*, 121 Conn. App. 659, 670 n.10 (2010) (court could not affirm financial orders in dissolution action on alternate grounds where court’s expressed basis was erroneous). As the court here did not make a finding of waiver, the Plaintiff cannot rely on such putative finding to salvage her judgment.

Even if the court had found waiver, the Plaintiff offers no authority for the notion that it may deny a proper motion for equitable reasons where the motion to dismiss is based on controlling authority. As Dr. Wang initially argued on appeal (Wang Br. at 15), *Peters v. United Community & Family Services, Inc.*, 182 Conn. App. 688 (2018), states what the statute meant from the time of its enactment in its current form and requires that any

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<sup>2</sup> In *Morgan v. Hartford Hospital*, 301 Conn. 388, 394 n.7 (2011), although waiver was not specifically raised at trial, the Supreme Court concluded that whether the defendants waived their right to challenge an opinion letter was within the scope of issues raised because they had filed a motion to dismiss. In *Morgan* the defendants waited 19 months to file their motion to dismiss, so there could be no dispute that the time for filing such a motion pursuant to Practice Book § 10-30 had long run. *Id.* at 392. The *Morgan* court reached a legal conclusion based on undisputed facts. *Id.* at 391. Here, there is no dispute that the Defendants timely moved to dismiss.

amendments to the complaint to correct the opinion letter (or provide one in the first place) occur before the statute of limitations runs. The Plaintiff does not quarrel with the basic principle of statutory construction. Thus, it was enough to preserve the claim that Dr. Wang joined the Center in filing an undisputedly timely motion to dismiss for lack of personal jurisdiction and joined in opposing the Plaintiff's untimely motion to amend her complaint.

Having set up her argument on the erroneous premise that the trial court found waiver, the Plaintiff cites cases that would not support such a finding. (See Pl.s' Br. at 12-13.) In *C. R. Klewin Northeast, LLC v. Bridgeport*, 282 Conn. 54, 89 (2007), the city made an untimely claim that a contract was illegally based on information available to it prior to the impaneling of the arbitrators and further failed to press the claim when the panel offered it the opportunity to do so. In both *Bowman v. 1477 Central Avenue Apartments, Inc.*, 203 Conn. 246, 251 (1987), and *Seal Audio, Inc. v. Bozak, Inc.*, 199 Conn. 496, 497-98, 518 (1986), the appellants waived a claim that their matters should be referred to a state trial referee by failing to object when the reference was initially made and by appearing and participating in the hearing before the referee.

In *Krattenstein v. G. Fox & Co.*, 155 Conn. 609, 615-16 (1967), the plaintiff failed to move to disqualify a judge from trying a case the judge had pretried and further objected to any continuance of the matter, thus waiving the claimed disqualification she raised on appeal.<sup>3</sup> Finally, in *Powers v. Farricelli*, 43 Conn. App. 475, cert. denied, 239 Conn. 954 (1996), the court refused to review a claim of instructional error where the appellant had agreed to the instruction given.

In these cases, the complaining party either failed to act when it could or affirmatively

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<sup>3</sup> The Plaintiff describes *Fiddleman v. Redmon*, 31 Conn. App. 201, cert. denied, 226 Conn. 915 (1993), as an "attempt to avoid verdict by late disqualification of conflicted attorney." (Pl.'s Br. at 13.) This is somewhat misleading. *Fiddleman* concerned a dissolution action in which the defendant sought to open the judgment based on the claim that the attorney for the minor child had represented the family relations officer in her dissolution action. *Id.* at 208. Because the defendant did not learn of the purported conflict until after judgment, the court afforded the normal review applicable to such actions. *Id.* at 210. The defendant lost on the merits, not due to waiver. *Id.* at 211.

participated in the proceeding or action without objection and later claimed the proceeding or action was improper. Here, of course, the Defendants did not agree that the trial court had personal jurisdiction, moved to dismiss for lack of personal jurisdiction, and objected to the amended complaint, so they can hardly be said to have sat on their hands.<sup>4</sup>

In any event, the controlling precedent—*Peters*—was not decided prior to trial, so the Defendants can hardly be blamed for the lack of a crystal ball. Nevertheless, the Plaintiff chastises the Defendant on page 13 of her brief for failing to re-raise the issue when this Court decided *Gonzales v. Langdon*, 161 Conn. App. 497 (2015), and then argues two pages later that “*Gonzales* and its progeny do not directly control this case.” (Pl.’s Br. at 15.) The Plaintiff cannot eat her cake and still have it. The Plaintiff’s “waiver” argument is meritless.

**B. Applying Plain Statutory Language Does Not Elevate Form over Substance.**

Section 52-190a(c) provides: “The failure to obtain *and file* the written opinion required by subsection (a) of this section *shall* be grounds for the dismissal of the action.” (Emphasis added.) *Bennett v. New Milford Hospital, Inc.*, 300 Conn. 1, 28 (2011), recognized that “the legislature adopted that section to make clear that dismissal is the *mandatory* remedy when a plaintiff fails to file an opinion letter that complies with § 52-190a(a).” (Emphasis added.) Nothing in the statutory language provides an exception to this mandatory remedy where the trial court erroneously denies a proper motion to dismiss.

Ignoring the plain language of the statute<sup>5</sup> and its construction by *Bennett*, the Plaintiff claims that applying the language of the statute “elevates form over substance to an absurd degree.” (Pl.’s Br. at 14.) To her, the purpose of weeding out frivolous malpractice actions is satisfied by obtaining a verdict. But if the Plaintiff is correct, the improper denial of a proper motion to dismiss will always be cured by a trial, as a verdict for the plaintiff will mean the

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<sup>4</sup> Moreover, if filing a motion to dismiss can include waiver arguments on appeal when that was not argued in the trial court, see *Morgan*, 301 Conn. at 394 n.7, the motion to dismiss here is sufficiently capacious to include the statute of limitations argument in light of new controlling authority.

<sup>5</sup> The Plaintiff does not cite subsection (c), let alone discuss the statutory language.

action was not frivolous and a verdict for the defendant will render the error moot. That construction renders subsection (c) superfluous. *Allen v. Commissioner of Revenue Services*, 324 Conn. 292, 310 (2016) (“we presume that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous”) (citation and internal quotation marks omitted).

The Plaintiff does not dispute that the failure to attach a proper opinion letter deprives the court of personal jurisdiction.

[N]o principle is more universal than that the judgment of a court without jurisdiction is a nullity. . . . Such a judgment, whenever and wherever declared upon as a source of right, may always be challenged. . . . If a court has never acquired jurisdiction *over a defendant* or the subject matter . . . any judgment ultimately entered is void and subject to vacation or collateral attack.

*Angiolillo v. Buckmiller*, 102 Conn. App. 697, 713, cert. denied, 284 Conn. 927 (2007) (emphasis added; citations and internal quotation marks omitted); see also *General Motors Acceptance Corp. v. Pumphrey*, 13 Conn. App. 223, 229 (1988). The failure to attach the opinion letter constituted defective process and deprived the court of personal jurisdiction.

To the extent that vacating the judgment would waste judicial resources, the Plaintiff's quarrel is with the legislature for making the opinion letter part of service of process and with the trial court for denying the motions to dismiss.<sup>6</sup> Put another way, by making the requirement to attach a proper opinion letter a matter of personal jurisdiction, the legislature *did* intend to provide a means of avoiding a verdict where the court never obtained jurisdiction over the parties as the legislature is presumed to be aware of decisional law. *State v. Fernando A.*, 294 Conn. 1, 19 (2009).

As for the purpose of § 52-190a, *Bennett* is instructive. There, the plaintiff attached an opinion letter by a surgeon who probably could have qualified to testify at trial, even though he was not a similar health care provider as defined by General Statutes § 52-184c(c). *Bennett*, 300 Conn. at 3-4. Acknowledging that strict adherence to the definition of similar health

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<sup>6</sup> She also seems to assume that the jury on a second trial would reach the same result as this jury, but there is no guarantee that a second jury would do so.

care provider could have harsh results, the court concluded that such construction was proper nonetheless. *Id.* at 21. If an expert is qualified to testify at trial, logically it follows that the expert can assess whether grounds exist to bring the action in the first place. But the court instead enforced the requirements set forth in the statute.

The Plaintiff next attempts to distinguish *Peters* and *Ugalde v. Saint Mary's Hospital, Inc.*, 182 Conn. App. 1, cert. denied, 330 Conn. 928 (2018), which involved defective opinion letters, by claiming “no purpose is served by dismissal” where an opinion letter purportedly exists prior to filing but is omitted from the complaint. (Pl.’s Br. at 15.) The short answer is that § 52-190a(c) expressly states that complaints filed without the opinion letter shall be subject to dismissal. This is a sensible, bright-line rule that makes deciding a motion to dismiss relatively straightforward. Further, it emphasizes that the legislature was serious when it required plaintiffs to file opinion letters with medical malpractice complaints.

The Plaintiff then turns to *Monti v. Wenkert*, 287 Conn. 101 (2008), which, as the Plaintiff correctly notes, construed an earlier version of § 52-190a. (Pl.’s Br. at 15.) The prior version did not provide for the dismissal of the action if such a letter was not attached to the complaint. See *Monti*, 287 Conn. at 131-32 (quoting § 52-190a (Rev. to 1999)). Rather, the omission rendered the complaint subject to a motion to strike, which gave the plaintiff the option to replead. Indeed, that occurred in *Monti*. *Id.* at 129-30. The defendant in *Monti* was relying the language in § 52-190a(a) that provides for an inquiry into the basis for the good-faith belief but asserted that claim on the eve of trial. *Id.* at 131. Whether the defendant met the requirements for such an inquiry was a matter of the court’s discretion. *Id.* at 132. It is not surprising that where the claim involves a discretionary, non-jurisdictional question, a harmless error analysis applied. But that is not the case here.

The Plaintiff’s “form over function” argument is without merit.

**C. The Statute of Limitations Ran Prior to the Plaintiff’s Improper Amendment.**

The Plaintiff now claims for the first time that her amendment to the complaint to add the opinion letter that she says existed prior to the commencement of the action was timely.

The trial court, however, expressly noted that “[t]here is no claim that the corrective action taken by the plaintiff occurred prior to expiration of the statute of limitations.” (MOD, 1/3/19, at 6; App. at A150.) As a general matter, a party cannot try her case on one theory and raise another theory on appeal. *Corrarino v. Corrarino*, 121 App. App. 22, 30 (2010) (“[a] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one”) (citation and internal quotation marks omitted).

The Court need not reach this unpreserved claim. It is well established that appellees cannot expect the court to review an alternate basis to affirm on a claim raised for the first time on appeal. *Perez-Dickson v. Bridgeport*, 304 Conn. 483, 498-99 (2012). “Only in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court. . . . This rule applies equally to alternate grounds for affirmance.” (internal quotation marks omitted; first alteration deleted). While the court may review such claims in light of exceptional circumstances, such as the recognition of a new, unforeseen constitutional right, or where the question concerns the public interest or justice between the parties, *id.* at 499-500, those concerns are not present here. There is no new right, constitutional or otherwise, or public interest at issue.<sup>7</sup>

As for justice between the parties, the Plaintiff could have raised this claim in response to the Defendants’ motions to reconsider, which squarely presented the statute of limitations argument, based on intervening, controlling authority.<sup>8</sup> The Plaintiff’s failure to do so prejudices the Defendants by precluding them from conducting discovery on the factual question

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<sup>7</sup> She asserts review will serve judicial economy (Pl.’s Br. at 17) but does not explain how this is so when a second jury may well find for the Defendants or some of them or find an entirely different amount of damages.

<sup>8</sup> She claims that the argument on the motion for reconsideration was “truncated” and only “scantily addressed the issues.” (Pl.’s Br. at 17 n.14.) She does not say she was foreclosed from making this argument or claim in the trial court but chastises the trial court for assuming from her silence that the statute of limitations had run. (*Id.*)

Her claim that Dr. Wang waived this claim by failing to plead a limitations defense (Pl.’s Br. at 18) is without merit as he expressly raised the claim in his motion for reconsideration. As for raising a statute of limitations defense at the beginning, there was no apparent basis for doing so as the Plaintiff filed her action within two years of the injury.

her claim poses to the extent a factual question actually exists.

It is also well established that where the trial court did not rule on an alternate basis to affirm, “the issue must be one that the trial court would have been forced to rule in favor of the appellee. Any other test would usurp the trial court’s discretion.” *Zahringer v. Zahringer*, 262 Conn. 360, 371 (2003) (citation and internal quotation marks omitted). As explained in *Lagassey v. State*, 268 Conn. 723, 748 (2004), “The limitation period for actions in negligence begins to run on the date when the injury is first discovered or in the exercise of reasonable care should have been discovered.” When the plaintiff should have determined in the exercise of reasonable care that she sustained an actionable injury “is ordinarily a question reserved for the trier of fact.” *Id.* at 749. The record here contains no evidence that the date by which the Plaintiff reasonably should have been aware of her claim was anything other than April 22, 2010. Accordingly, there is no basis for this Court to conclude, as a matter of law, that the limitations period started to run at some point after her injury.

But even if the Court reaches the merits, the Plaintiff cannot prevail. If the plaintiff is aware of the injury on the date of the negligent act, the two years begins to run then. Thus, in *Lindsay v. Pierre*, 90 Conn. App. 696, 701 (2005), where a plaintiff experienced minor bruising and a headache on the day of her car accident, she discovered her injury for purposes of the statute of limitations on that day, even though she later developed other injuries.

The Plaintiff relies on *Lagassey* for the proposition that a plaintiff needs a medical opinion to discover possible malpractice. (Pl.’s Br. at 19 n.6.) *Lagassey* and the cases upon which it relies show that the analysis is a bit more nuanced. In *Lagassey*, the plaintiff’s decedent died after the state physicians failed to address his aneurysm properly. 268 Conn. at 727. Another physician reviewed the decedent’s medical records and concluded that he received proper care. *Id.* at 728. Subsequently, a different physician indicated possible malpractice. *Id.* The plaintiffs’ action was dismissed as untimely, but the Supreme Court reversed because when the plaintiffs should reasonably have discovered the malpractice

was a factual question.<sup>9</sup> *Id.* at 750-51. Similarly, in *Catz v. Rubenstein*, 201 Conn. 39, 49 (1986), the statute of limitations did not begin until she learned that she had been misdiagnosed as to the first growth of her cancer. In both cases, the parties were initially misled as to the causes of the injuries, which were not readily apparent in the first instance.

In contrast, in *Burns v. Hartford Hospital*, 192 Conn. 451, 452 (1984), the Plaintiff received intravenous fluids in his legs following a car accident. He complained of soreness in his legs and was told that his legs became infected due to contaminated intravenous tubes but they would heal in time. *Id.* at 452-53. The statute began to run when he was told of the infected tubes, not later when his legs failed to heal properly. *Id.* at 459.

The present case does not involve a misdiagnosis, a situation where injuries worsened significantly or where the nature of the injury was not initially known, or where the Plaintiff was affirmatively misled by a neutral party as to the propriety of the care she received. In other words, there was a legitimate question as to when those plaintiffs knew or should have known that they might have a malpractice claim. Here, the injury—a severe burn on the Plaintiff's foot from a defective lamp—was immediate and obvious. It was also not something to be expected in an acupuncture session, so the Plaintiff should have been aware she had a claim at the time of the injury, even if she could not (and still cannot) explain the causal link. Her extended limitations argument is without merit.

Section 52-190a and decisional law construing it make clear that the failure to attach an opinion letter to a medical malpractice complaint deprives the court of personal jurisdiction and renders the case subject to dismissal on a timely motion. The Plaintiff cannot cure this error by amended complaint after the statute of limitations runs. Application of these principles requires reversal and vacation of the judgment, which is a nullity. None of the Plaintiff's creative attempts to avoid this result have any merit.

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<sup>9</sup> The court never resolved this question on remand as it granted summary judgment on the grounds that the statute of limitations for wrongful death had expired and was not tolled. *Lagasse v. State*, 50 Conn. Supp. 130 (2005), *aff'd*, 281 Conn. 1 (2007) (*per curiam*).

## II. THE COURT SHOULD HAVE HELD A HEARING ON THE MOTION TO DISMISS.

The Plaintiff asserts that her counsel's affidavit and the documents attached to it "established" that her counsel had received the undated opinion letter prior to filing the complaint. (Pl.'s Br. at 19.) But her counsel and the authors of the correspondence were never subject to cross examination and the court never had the opportunity make credibility findings. That is harmful, as the court could have concluded from the witnesses' demeanor that they were not credible and the Plaintiff failed to carry her burden. Given that the internal communications of her counsel would have been privileged or work product, the only way to elicit information regarding the opinion letter was through examining the actors involved.

The Plaintiff chastises the Defendants for not seeking discovery on the subject when discovery commenced (Pl.'s Br. at 20), but that argument misses the point, which is that the Defendants wanted to cross examine the witnesses to assess their credibility. In any event, the Plaintiff's claim regarding discovery is a bit misleading. Prior to trial, the Center sought the file materials for the Plaintiff's expert Simone Wan, including whether she was involved in pre-litigation investigation. (Center's Notice, 11/5/15, at 3; Rep. App. at A2.) The Center's request included correspondence and emails. (*Id.* at 5-6; Rep. App. at A3-A4.) Such information would have shed light on when the Plaintiff obtained the opinion letter, but she objected on the grounds that § 52-190a bars discovery of such information. (Pl.'s Obj. 11/10/15; Rep. App. at A5.) The trial court agreed. (Order, 11/27/15; Rep. App. at A7-A8.) Put simply, the Plaintiff is in no position to criticize the Defendants for failing to pursue discovery on this point when she successfully objected to such discovery.

## III. THERE WAS INSUFFICIENT EVIDENCE OF CAUSATION.

The Plaintiff attempts to avoid the insufficient evidence of causation by pointing to other allegations of the purported breach of the standard of care. She first claims that Popp testified that Dr. Wang placed the lamp seven inches above the Plaintiff's foot, which was lower than the 12-18 inches that Moran testified to as the standard of care. (Pl.'s Br. at 22-23.) This assertion overstates Popp's testimony.

Popp testified that if he pulled the head of the exemplar lamp back the lamp would drop nine inches, which would reach the Plaintiff's toe if the table was three feet off the floor. (Tr. 12/1/17 at 147; App. at A275.) But there was no evidence that Dr. Wang pulled the head of the lamp back or that the lamp would lower that much without being pulled. Without evidence as to how the lamp lowered, the height of the lamp does not establish proximate cause.

As for Moran's testimony regarding the standard of care, she testified that the recommended distance of 12 -18 inches was to avoid causing a burn. (Tr. 12/12/17 at 186; Rep. App. at A16.) But Popp testified that a domed guard over the lamp two inches from the heating element would reach a temperature of only 120° F and that he was able to grab the guard. (Tr. 12/1/17 at 79; Rep. App. at A14.) The twelve-inch distance that Moran said was the standard of care could not have been to prevent burns from placing the lamp head at a closer distance but must have concerned lamps that have a tendency to lower unexpectedly. Thus, the causation issue is how the lamp lowered and whether Dr. Wang's inspections would have revealed the tendency to lower, not the height of the lamp.

The Plaintiff then claims that the issue is whether Dr. Wang failed to use a safe lamp and that if he noticed any problems with the lamp, he should not use it.<sup>10</sup> The Plaintiff argues that Dr. Wang would not have conducted his "extensive inspections" if he had not observed problems with the lamp. (Pl.'s Br. at 25.) But the Plaintiff argued that the standard of care was to inspect the lamp prior to each use, so the Plaintiff is claiming that evidence of his compliance with the standard of care is also evidence that he breached the standard of care. "Heads I win, tails you lose" is not normally a recognized legal doctrine.

The Plaintiff next points to the withdrawn third-party complaint as evidence that Dr. Wang knew the lamp lowered spontaneously because of design flaws. (*Id.*) The Plaintiff claims the jury could infer he knew this by observing the lamp lower spontaneously. (*Id.*)

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<sup>10</sup> The Plaintiff argues that the jury could have found Dr. Wang's testimony not to be credible. (Pl.'s Br. at 25.) The jury can do so, but disbelief of a witness does not mean the jury can draw the opposite conclusion. *Masse v. Perez*, 139 Conn. App. 794, 800-01 (2012), cert. denied, 308 Conn. 915 (2013).

This assertion is sheer speculation. Causation “must be based upon more than conjecture and surmise.” *Paige v. St. Andrew’s Catholic Church Corp.*, 250 Conn. 14, 26 (1999) (citations and internal quotation marks omitted). The jury may draw reasonable inferences if such inferences rest upon some basis of definite facts. *Id.* at 33.

Nothing in Dr. Wang’s withdrawn complaint against Wabbo indicates how he knew prior to the incident at issue of the lamp’s tendency to lower spontaneously. While he testified that he agreed with the allegations (Tr. 11/15/17 at 171; Rep. App. at A10), he did not indicate that this was from personal knowledge. He also made clear that these allegations were made “after the incident.” (*Id.* at 220-21; Rep. App. at A11-A12.) To be sure, the jury was not required to believe Dr. Wang, but they could not draw a contrary conclusion from their disbelief. The only reasonable inference to be drawn from the allegations in the complaint against Wabbo is that Dr. Wang thought the lamp lowered spontaneously because of what happened to the Plaintiff. This claim presents too slender a reed to support a finding of causation.

The Plaintiff relies on speculation in pointing to other evidence to support the verdict. She cites the testimony by Wabbo’s owner that Wabbo expects acupuncturists to notice a tendency of the lamps to lower after two years of use. (Pl.’s Br. at 26.) It is sheer speculation to conclude that Wabbo’s expectations are evidence that the lamp in question was showing a tendency to lower that was observable by Dr. Wang. This is especially true where both engineering experts testified that an external force was necessary to move the lamp and where Popp testified that would require a complicated inspection to detect lowering.

Similarly, the Plaintiff cites testimony that stories regarding the lamps’ tendency to lower were circulating in “the acupuncture community.” (Pl.’s Br. at 4.) She cites the testimony of Jennifer Brett who indicated that at meetings of the Council of Colleges of Acupuncture and Oriental Medicine the issue was discussed. (Tr. 12/14/17, at 138; Pl.’s App. at PA280b.) But there is no evidence that Dr. Wang was a member of this council or attended the meetings at which this was purportedly discussed. It is sheer speculation to impute knowledge of the lamp’s tendency to lower to Dr. Wang based on discussions by a group in

which there is no evidence that he was a member. Likewise, as for acupuncture students being taught about the purported danger (Pl.'s Br. at 4), Brett testified only that this topic was presented in a textbook, not taught directly. (Tr. 12/14/17 at 145; Pl.'s App. at PA283.) There was no evidence that Dr. Wang read such textbooks or had any reason to do so.

The Plaintiff overstates the engineers' testimony, especially Popp's, when she states that they "testified that the propensity to lower inadvertently would gradually become apparent." (Pl.'s Br. at 26-27.) After noting that lowering of the lamp "would become increasingly observable," Popp responded to whether that would provide a basis not to use the lamp:

Well, therein lies the problem because when you have a gradual failure, it gets a little worse every time. When is it bad, how bad is bad? So the first day you move it, it's fine, you buy it, it comes out of the box. A couple months later you move it, it dropped down half inch, do you notice it, maybe not. Week later you notice it drops down three quarters of an inch so it's gradual.

There's no threshold where one day it suddenly drops down five inches, it starts slowly. So it can be deceptive and maybe not observable unless you're measuring with a tape measure, for example, or hanging weights on it and watching to see if it moves.

(Tr. 12/1/17 at 175; App. at 287.)<sup>11</sup> Popp then testified that the daily inspections would need to be "pretty complicated" to reveal the lowering. (*Id.* at 176; App. at A288.) For Popp, then, the tendency to lower would only be noticeable if the inspections included measurements and weights. There was no testimony that such complicated inspections were required.

As for Vallee, his complete answer regarding whether the tendency of the lamp to lower would be noticeable was, "Oh yeah. If you were manipulating the lamp day after day after day *and all of the sudden it started dropping under its own weight*, then you notice that." (Tr. 12/7/17 at 54-55 (emphasis added); App. at A305-A306.) That testimony stands for the unremarkable proposition that when a lamp lowers suddenly, it is noticeable to the user. It does not follow that such lowering definitely occurs after a particular period of time or that the lamp at issue had lowered previously.

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<sup>11</sup> The Plaintiff claims existence of a condition is evidence of knowledge of the condition. (Pl.'s Br. at 27 n.13.) For reasons already given there was no evidence of this lamp's condition, except for the minor wear Dr. Wang testified to, that would support the premise that the lamp had been lowering. The Plaintiff's syllogism is based on a flawed assumption.

The Plaintiff cites her expert's testimony that she was able to observe that her admittedly different lamp would lower when moved. (Pl.'s Br. at 27.) The actual testimony was:

Q And [Dr. Wang] gently shook [the lamp] to see if that had any effect on the heads of the lamp. Is that a reasonable thing for an acupuncturist to do?

A Yes, because you can usually see if you move the lamp, the heads would fall a little bit.

(Tr. 12/6/17 at 163; Pl.'s App. at PA227.) This is evidence that if the lamp was loose, it would fall if it was moved. It is not evidence that the lamp was, in fact, loose. This testimony cannot bear the weight of the inference the Plaintiff seeks to place on it.

The Plaintiff then tries to buttress the evidence by pointing out that the only way the burn could occur was if the lamp lowered onto her foot. (Pl.'s Br. at 28-29.) No one disputes that the lamp lowered, as opposed to tipping or being pulled onto her foot. The question is how the lowering occurred when the evidence was that some sort of excitation was necessary and no such evidence of excitation was presented. Moreover, that the lamp lowered is not evidence that Dr. Wang knew or could have known before then that it would lower. See *DiPietro v. Farmington Sports Arena, LLC*, 306 Conn. 107, 117-121 (2012) (no evidence that reasonable inspection of flooring in indoor soccer area would alert defendants to danger posed by carpet). Without such evidence, there is no basis to conclude that something Dr. Wang did or failed to do caused the Plaintiff's injury.

In sum, although the Plaintiff seeks to divert attention away from the lack of causation evidence, she cannot do so because she cannot explain on this record how the lamp lowered and how Dr. Wang could have prevented it based on the evidence available to him as to the lamp's condition. The lack of causation evidence warrants a directed verdict.

#### IV. THE JURY INSTRUCTION WAS IMPROPER.

Rather than engage the arguments Dr. Wang presented based on the law and the record, the Plaintiff invents a phalanx of straw men to knock it down instead. First, the Plaintiff claims that Dr. Wang's requested instruction was improper because "[t]he jury could find that the metal plate burned Ms. Kissel without expert support." (Pl.'s Br. at 33.) No one disputes

that the plate burned the Plaintiff's foot. The question is how it lowered to her foot and whether anything Dr. Wang did or failed to do caused her injury. That question goes to the mechanics of the lamp, which required expert testimony.

The Plaintiff next claims that the jury could decide causation based on an evaluation of Dr. Wang's testimony. (*Id.*) As Dr. Wang did not testify affirmatively as to causation, the Plaintiff appears to suggest that the jury's disbelief of his testimony was evidence of the opposite. This proposition, of course, is not the law. *Masse*, 139 Conn. App. at 800-01.

Next, the Plaintiff claims that she could prevail on other, purportedly unchallenged, allegations of negligence (Pl.'s B. at 33) but Dr. Wang has already explained why causation is tied to why the lamp lowered and his lack of knowledge of it.

The Plaintiff disputes the argument that turning over the gate-keeping function regarding the need for expert testimony permitted the jury to ignore the experts. But that is exactly what the instruction did. If the jury concluded that they could decide the matter without expert testimony, then they would have no need to consider it.<sup>12</sup> Given the lack of evidence of causation, the most logical explanation is that the jury concluded that lamp fell because Dr. Wang did not inspect it immediately prior to use on the Plaintiff without regard for how a second or third inspection that day would have alerted him to the danger the lamp posed. As for the general charge that the jury could weigh the evidence as it saw fit (Pl.'s Br. at 34), such instruction merely emphasizes that the jury could ignore the experts.

The court's harmful instructional error warrants a new trial.

### **Conclusion**

The judgment should be reversed with direction to dismiss for lack of personal jurisdiction or to enter for the Defendants for insufficient evidence as to causation. Alternately, the court should reverse and remand for an evidentiary hearing on the motion to dismiss or for a new trial because of the instructional error.

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<sup>12</sup> That the jury asked to hear Popp's testimony does not lead to the conclusion that it found such testimony persuasive.

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## CERTIFICATION

Pursuant to Practice Book § 67-2(g), I hereby certify that: (1) the electronically submitted brief and appendix were emailed on January 22, 2020, to counsel of record listed below; and (2) that the brief and appendix do not contain any names or personally identifiable information that is prohibited from disclosure or that any such information has been redacted.

Pursuant to Practice Book § 67-2(i), I hereby certify that: (1) in compliance with Practice Book § 62-7, a copy of the foregoing brief and appendix sent to the counsel of record listed below on January 23, 2020; (2) that the brief and appendices are true copies of the brief and appendix filed electronically pursuant to Practice Book § 67-2(g); (3) that the brief and appendix do not contain any names or personally identifiable information that is prohibited from disclosure or that any such information has been redacted; (4) and that the brief complies with all provisions of Practice Book § 67-2.

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